No. 2574

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

M. P. FLEISCHMAN,

Plaintiff in Error,

VS.

JULIUS RAHMSTORF,

Defendant in Error.

Upon Writ of Error to the District Court for the Territory of Alaska, Fourth Judicial Division.

BRIEF OF PLAINTIFF IN ERROR.

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FRANK D. MONCKTON, Clerk,

By......................., Deputy Clerk.

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Statement of the Case.

This is an action for damages in the sum of $2,000.00, alleged to have been occasioned by the acts of the defendant below in accepting employment as clerk in a merchandise store at the town of Rampart, Alaska, which it is alleged was in violation of the conditions of a certain contract of the defendant below to refrain in that behalf for three years, incident to and as a part of a sale of a stock of merchandise or merchandise business from the said de-

fendant to the plaintiff below, on May 26, 1910.

For the purpose of defining the issues in the court below, the pleading may be summarized as follows:

The complaint alleges that on said May 26th, 1910, and for a long time prior thereto, M. P. Fleischman conducted a general merchandise store and business at said Rampart and was the owner of a stock of dry-goods, groceries, provisions, etc., in that connection, and on said day sold to said Julius Rahmstorf said stock **and the good will of said business**; that upon the payment for said stock by Rahmstorf the said Fleischman executed a contract in writing as follows:

"For and in consideration of the sum of One Dollar to me in hand paid by Julius Rahmstorf, of Rampart, Alaska, I, M. P. Fleischman, of Rampart, Alaska, hereby agree to the following:

"That should I resign my position as Postmaster of Rampart, Alaska, I will do so in favor of Julius Rahmstorf, providing he be eligible at the time of my resignation.

"I also agree and promise not to engage in any way in the line of general merchandise for the next three years, that is, up to May 26, 1913, inclusive, in the City of Rampart, Alaska, and should I do so, I hereby promise to forfeit the sum of Two Thousand Dollars. This last clause shall have no effect, should the said Julius Rahmstorf discontinue business before May 26, 1913"; that on or about the ....day of June, 1912, the said M. P. Fleischman, disregarding his said agreement with plaintiff, opened

a general merchandise store in said town of Rampart, Territory of Alaska, near Rahmstorf's place of business, and began to and is now conducting a like business to that referred to in said agreement in writing; that by reason of the premises plaintiff has suffered damages in the sum of two thousand dollars, no part of which has been paid by Fleischman, and that Rahmstorf has since the execution of said agreement continued in the business purchased by him from said Fleischman at said Rampart.

The plaintiff was permitted to amend his declaration at the trial by alleging that Fleischman opened up and conducted such competing business "as managing clerk of the Miner's Store," which is made one of the grounds of error herein. (See Record, pp. 4 and 55).

The answer admits that Fleischman conducted such business and owned such stock of goods, and that he sold the same—or at least the stock of goods, to Rahmstorf on May 26, 1910; but denies that he has ever opened up or conducted a like business to that referred to, or that the said Rahmstorf has suffered damages, or that Rahmstorf is still conducting the merchandise business purchased by him from Fleischman. The answer alleges affirmatively the facts of such sale, and the further defence:

1.—That at the time of the sale Fleischman's wife was seriously ill and he intended to take her to the States for treatment, but that before such plan could be carried out his wife died.

2.—That for several months after such sale,

Fleischman, at the request of Rahmstorf, was employed as clerk and salesman in Rahmstorf's store and continued as such until about September, 1910, and during all of that time was postmaster and conducted the Rampart Postoffice in said Rahmstorf's store.

3.—That about the first of June, 1910, and before he left Rampart as intended, he executed and gave to Rahmstorf the agreement declared upon, because of such intention to leave Alaska and believing the same was not enforceable.

4.—That after the death of his wife, Fleischman was without means or object in going to the States, and decided to remain in Rampart and secure employment; that on or about June 1, 1912, one F. J. Kalning opened up in Rampart a general merchandise store (known in the evidence as the Miner's Store) and sought to employ Fleischman as a clerk therein, Fleischman still being postmaster and conducting the U. S. Postoffice at Rampart in the building formerly and before the sale to Rahmstorf occupied by him as a store; that Fleischman agreed to work for Kalning as such clerk if Kalning would permit him to retain and conduct the postoffice therein, and also to retain certain agencies which he then held, which Kalning agreed to, and Fleischman accepted such clerkship at $75.00 a month.

5.—That Fleischman has never since the said sale to Rahmstorf resigned as postmaster at Rampart, nor has be opened up, owned or conducted except as such clerk any merchandise business at Rampart, nor has

he as such clerk of Kalning sought to divert or alienate merchandise trade from said Rahmstorf.

6.—That said agreement of May 26, 1910, being made separate and apart from such sale, and on a separate consideration, was and is without sufficient considertion and void. (Record, pp. 9 to 12).

The reply denies generally the affirmative matter of the answer, and further alleges as inducement for the execution of May 26, 1910, "that on or about the 26th day of May, 1910, the defendant came to the plaintiff and as an inducement of entering into negotiations for the sale of his business to plaintiff, informed plaintiff that he would leave Alaska and go Outside and stay there, and before leaving Alaska he would turn over to plaintiff the postoffice then being conducted by him, as well as the agency of the North American Transportation & Trading Company, then held by him" (Record, p. 13); that Fleischman continued in Rahmstorf's employ as clerk until February or March, 1911, and during the period between May 26, 1910, and that date continued as postmaster at Rampart and conducted the postoffice in said Rahmstorf's store '(Record, p. 14); and further, that the purchase price for the said stock of dry-goods, etc., sold by Fleischman to Rahmstorf on May 26, 1910, was the consideration for the sale of said stock and merchandise business and the good-will thereof and for the defendant executing said agreement (Record, p. 15).

Upon the issues thus joined the defendant in the court below demurred and moved for judgment on

the pleadings, and the ruling of the lower court upon such demurrer and motion is assigned as error. (See Record, pp. 26, 27, and 83). The question of the form of the action and state of pleadings was again urged before the taking of testimony (Record, p. 29), and the ruling of the court thereon is assigned as error (Record, p. 83).

There were some informal matters in the answer, for instance, the allegation that Fleischman executed said contract believing the same could not be enforced, which resulted from the fact that the answer was drawn by Fleischman's counsel at Fairbanks and sent to Rampart for signature, and that in Fleischman's hurry to get the answer executed and returned in the mail for filing at Fairbanks he failed to cross out such matters. (Record, p. 49).

The case was tried to the Court without a jury, resulting in the entry of a judgment against the said M. P. Fleischman on March 9, 1914, wherein it is considered, ordered and adjudged that "Julius Rahmstorf do have and recover of and from the defendant, M. P. Fleischman, the sum of Two Thousand Dollars ($2,000)" **damages,** etc. It is to reverse this judgment that plaintiff in error is now here, and or that purpose we rely upon the following Assignments:

I.

That the District Court for the Territory of Alaska, Fourth Judicial Division, erred in overruling the demurrer of the defendant and plaintiff in error to the original complaint and reply filed in said cause.

II.

That the said court erred in denying the motion of defendant and plaintiff in error for judgment upon the pleadings as settled in said cause.

III.

That the said court erred in permitting the plaintiff (defendant in error) to introduce evidence in support of his said complaint and reply, because the same are insufficient in law to entitle said plaintiff (defendant in error) to the relief demanded or any relief, or to constitute a cause of action against the defendant (plaintiff in error).

IV.

That the said court erred in permitting the plaintiff (defendant in error) to introduce, and in receiving in evidence the purported contract or agreement marked "Plaintiff's Exhibit A," as follows:

"For and in consideration of the sum of one dollar to me in hand paid by Julius Rahmstorf, of Rampart, Alaska, I. M. P. Fleischman hereby agree as follows That should I resign my position as postmaster of Rampart, Alaska, I will do so in favor of Julius Rahmstorf, provided he be eligible at the time of my resignation. I also hereby agree and promise not to engage in any way in the line of general merchandise for the next three years, that is, up to May 26, 1913, inclusive, in the city of Rampart, Alaska; and should I do so, I hereby promise to forfeit the sum of two thousand dollars. This last clause shall have no effect should said Julius Rahmstorf dis-

continue business before May 26, 1913.

"M. P. FLEISCHMAN.

"Signed in the presence of

"F. J. KALNING.

"Dated at Rampart, Alaska, May 26, 1910."

over the objection of the defendant (plaintiff in error) that the same was irrelevant, incompetent, and immaterial, not sufficient in law as a basis of an action of this kind, and because the pleadings show that it was not incident to the sale of the business or stock of merchandise by Fleischman to Rahmstorf, but incident to a contract over the postoffice—a separate agreement from the sale altogether as testified to by said Rahmstorf.

V.

The said court erred in permitting the plaintiff (defendant in error) to introduce, and in receiving in evidence the receipt marked "Plaintiff's Exhibit "B," as follows:

"Rampart, Alaska, 5-26-10. Received from Julius Rahmstorf seventeen hundred ninety-one 15-100 Dollars ($1791.15) for a stock of merchandise, as payment in full.

"M. P. FLEISCHMAN."

over the objection of the defendant (plaintiff in error) as set forth in Assignment of Error IV.

VI.

The said court erred in permitting the said Julius Rahmstorf to testify generally as to damages in answer to the following question of his counsel: "Q. Have you been damaged by the fact that this

store was opened up there?" (Meaning the Miner's Store of F. J. Kalning wherein said Fleischman was employed as clerk in said Rampart Alaska from and after about June 1, 1912, which said employment constitutes the sole alleged breach of said agreement of May 26, 1910); over the objection of counsel for defendant below that the same was irrelevant, incompetent and immaterial and called for the conclusion of the witness, and said witness should be required to state the facts from which the court could reach a conclusion, on the question of damages.

VII.

The said court erred in permitting the said Julius Rahmstorf to testify as to the matter outside the expressed substance of said claimed agreement "Plaintiff's Exhibit A," in answer to the following question of his counsel as follows: "Q. Were the terms of this agreement, Plaintiff's Exhibit A discussed during the transaction?" over the objection of the defendant that the same was irrelevant, incompetent and immaterial, the agreement declared upon being in writing and not ambiguous on its face.

VIII

The said court erred in denying the motion of the defendant below, made at the point when the plaintiff below had rested his case in chief, for judgment in favor of said defendant upon the pleadings and the evidence then before the said court, on the ground generally that said plaintiff had entirely failed to prove his case, for the reasons (1' that the evidence of said plaintiff shows that the agreement, Plaintiff's

Exhibit A was induced by the proviso therein as to the post-office at Rampart and the promise of the agency of the N. A. T. & T. Company, and not by the sale of the Fleischman stock of merchandise; (2), further that the contract for the purchase of the Fleischman stock was consummated some time in April, 1910, but before May, 1910, and the said agreement of May 26, 1910 was therefore separate and apart from said sale and on a separate consideration; (3) that even if said agreemnet of May 26, 1910, be considered valid and binding, the evidence fails to show that the defendant has violated the same, and (4) while plaintiff testifies he has been damaged in his business from June 1, 1912 to May 26, 1913 for more than the amount specified in said agreement of May 26, 1910 there is no evidence to show of what such damage consists, or what amount of business the plaintiff did prior and subsequent to said alleged breach, or that any loss of business claimed was attributable to the acts of the said defendant.

IX.

The court erred in its decision, upon the motion mentioned in Assignment No. VIII, by which the defendant was compelled to introduce evidence after failure of proof on the part of the said plaintiff.

X.

The court erred in sustaining the objection of the plaintiff below propounded by the said defendant to the witness Julius Rahmstorf when called as a witness on behalf of the said defendant, as follows: "Q. What merchandise license did you pay for the

year 1912?" said witness already having testified that he paid such license under the laws of Alaska for the year 1911 on the basis of from $10,000 to $20,000 annual business, and the purpose of said question being to show by the answer of said witness that he paid the Alaska license on his said business at Rampart for the year 1912 and 1913 at the same rate as for 1911, showing that it was untrue that said plaintiff had been damaged by the alleged acts of the defendant.

XI.

The said court further erred, in connection with the error last before assigned, in ruling and deciding upon the right of the parties as to the introduction of evidence, as follows:

"Mr. Gillette): This is a damage suit,—

(The Court,: It is an action for damages, and the damages are fixed by the terms of the contract.

(Mr. Gillette): Does the Court hold that the plaintiff must not show damages even under that contract?

(The Court): I think, if the plaintiff is entitled to damages, that they are fixed by that contract," to which said decision the defendant below then and there excepted.

XII.

The said court erred in excluding from evidence and denying the offer of defendant below to prove, (a) that the merchandise license required under the laws of Alaska for the Miner's Store at Rampart Alaska (the store in which Fleischman was employed

as clerk which constitutes the sole alleged ground of breach of said contract Plaintiff's Exhibit A) for the years June 1, 1912 to and including the year 1913 and to the date of the trial in 1914 were paid for and taken out in the name of F. J. Kalning, as proving or tending to prove the issue on behalf of said defendant; and (b) that the merchandise license required under the laws of Alaska for the years 1911, 1912 and to the time of said trial for the store of said Julius Rahmstorf at Rampart Alaska, which business is the alleged object of the damages claimed, were taken out and paid for by said Rahmstorf at the same statutory schedule rate after the alleged damage as before, which proves or tends to prove that it is not true as testified by said Rahmstorf that his business decreased fifty per cent or more after Fleischman began clerking in said Miner's store.

XIII.

The court erred in excluding the evidence called for by, and in sustaining the objection of the plaintiff below to the following question propounded to the said defendant while on the stand in his own behalf, as follows:

"Q. I will ask you to state whether your acts, in your working for the Kalning store as you have testified, ever in any manner damaged the plaintiff in this action?

(Mr. Erwin): We object to that as calling for a conclusion of the witness, which is a matter for the court to determine," and especially was such ruling error since the court had, over the objection of said

defendant, permitted said plaintiff to state generally and without producing the best evidence in the way of books of account &c, that the acts of said Fleischman in clerking in the Miner's Store had damaged him (Rahmstorf) in more than fifty per cent. of his sales.

XIV.

The said court erred in permitting plaintiff below, at the conclusion of the evidence, to amend paragraph four of his complaint by inserting at the end thereof the words "as managing clerk of the Miner's Store at Rampart," over the objection of the said defendant that such amendment so changed the issues as to constitute a violation of the laws of Alaska relating to amendments of pleadings, and to injure the substantial rights of the refendant.

XV.

The said court erred in overruling the motion of the said defendant made at the conclusion of the evidence, for judgment upon the pleadings and the evidence then before the court.

XVI.

The said court erred in refusing to make and enter in said court and cause, the special findings, conclusions and judgment propounded on behalf of said defendant.

XVII.

The said court erred in overruling the objections of said defendant to the proposed findings; conclusions on behalf of said plaintiff and against said defendant, and in making and entering the same, for

the reasons set forth in said objections of defendant and others appearing upon the face of the proceedings.

XVIII.

The said court erred in its decision and ruling upon the motion for a new trial made by the said defendant (which said decision is set forth at length in the record herewith, and especially holding thereby, on the question reserved for argument after trial, that the said contract "Plaintiff's Exhibit A" provided for measured or liquidated damages instead as for penalty as therein provided, and in entering judgment for the plaintiff below for the sum of $2000.00 damages without any proof thereof or opportunity on behalf of said defendant to show to the contrary.

ARGUMENT, POINTS, AND AUTHORITIES.

1.—**On the Facts:**

In order that we may have the premises for the law hereinafter to be applied, let it first be determined from the record:

What, When, and Under What Circumstances, Was the Sale in Question Made?

1. As determinative of the nature of the sale, the receipt offered in evidence and received on behalf of the plaintiff below as "Exhibit B" speaks fully and finally:

"Rampart Alaska, 5-26-10. Received from Julius Rahmstorf seventeen hundred ninety-one 15-100 Dol-

lars ($1791.15) for a stock of merchandise, as payment in full. M. P. FLEISCHMAN."
(Record, p. 33.)

2. As to the date of the sale, Mr. Rahmstorf states: "It is impossible for me to state the exact date of this agreement, it may have been in April—it was prior to May. We agreed upon the amount—prices at which the goods should be taken over." (Record, p. 30.) "We then, on May 19th, commenced moving his stock to the building which I now occupy —I rented in the meantime from him—belonging to the N. A. T. & T. Company. He moved his stock in there and invoiced it, and ascertained the prices as near as we could, which occupied several days." (Record, p. 31.) "As to the date when the sale took place, as I recollect Fleischman commenced moving his stock on the 19th of May, 1910; it took probably two or three days to move them. They were moved on the 19th, 20th and 21st of May; it is a question whether they were my goods as soon as they were moved into my store. In my opinion they were not until I had paid for them." (Record, p. 36.)

Mr. Fleischman testifies (Record, p. 44): "As soon as I sold to Rahmstorf, about May 20th, 1910, we started to take inventory and move the stock about May 21st, the day the sale was made." "I started to collect rent from Rahmstorf on May 26, 1910, on which date I think we finished the inventory and figured up what was coming to me on the stock of goods." (Record, p. 45.)

3. As to the circumstances under which the sale

was made, there is but one material variance in the testimony of the two parties (and the truth must be determined from their testimony alone, aided only by the circumstances proved), and that is as to whether the alleged contract to refrain (Plaintiff's Exhibit "A," Record, p. 32) was a part of or in any manner entered into the matter of the sale of the stock of goods.

Naturally, the plaintiff below having alleged that the contract to refrain was a part of the consideration for the sale, he tried to prove it and, as we believe we will be able to show, warped the facts to meet that end. He says: "About May, 1910, I had some negotiations with defendant Fleischman. He appeared several times prior to that in my store and made me a proposition to take over his **general merchandise,** stating he was going to leave the country if I was willing to buy him out. I at first refused, the conditions at Rampart not being very good. But he came around again and made me the further inducement that he was going to turn the post office over to me, provided I would be appointed, of course, and also the agency of the N. A. T. & T. Company. * * * I also told him outside of the store building, in a case like this, he would have to make a contract that he was going to leave the country, or that he was not going to conduct any business; which, of course, he said it was thoroughly understood that he was going to leave Alaska anyway." (Record, pp. 30, 31.)

On the same subject Mr. Fleischman testifies: "Mr. Rahmstorf asked me on the 26th of May, or after

that—I don't remember just when it was—if I would have any objection to making such an agreement." (Record, p. 45.) "I think it was the 26th of May. Not before this; it might have been after, after the goods were all sold to Mr. Rahmstorf, Mr. Rahmstorf asked me if I would have any objection to giving him an agreement that I would not enter into business any more for three years. * * * There was nothing ever spoken about an agreement before the 26th of May. It was made up after the 26th, after the goods were sold and in Mr. Rahmstorf's possession." '(Record, p. 47.)

Rahmstorf shows himself by the record to be a shrewd business man; he is not that happy-go-lucky sort indigenous to the Far North, otherwise he would not have conceived the idea of getting a contract to refrain out of Fleischman before he left the country. Consequently, if it were true that the contract to refrain were a part of the original negotiations, is it not natural that he would have had the same reduced to writing at that time, or, if it were deferred until the date of payment for the goods, would he not have had recited in such contract that the same was upon the whole consideration for the stock of goods and not on a separate consideration? The answer is plain. Fleischman clerked for him in his store after the sale until about February, 1911, and then he and Rahmstorf had a falling out; Fleischman criticised him for the way he conducted his business, and Rahmstorf has been criticising Fleischman ever since. (Record, p. 37.) The tacking of this so-called agree-

ment to refrain onto the sale was purely an afterthought of Rahmstorf for the purpose of oppression, and for the purpose of running Fleischman out of the community. This court may say the court below had the witnesses before it, and is presumed to have passed upon all matters of interest and credibility; but this is not true, because the lower court proceeded upon a theory entirely independent of such considerations, to-wit, that the so-called agreement to refrain was necessarily a part of the sale of the stock of goods and the sum therein named was for liquidated damages and not for penalty as therein provided. (See Opinion of Court, Record, pp. 73-4-5.)

Conceding That the So-Called Contract to Refrain Was Incident to the Sale, Was There a Breach?

1. After the sale of the stock of merchandise by Fleischman to Rahmstorf, Rahmstorf became the tenant of the N. A. T. & T. Company, for which Fleischman was agent, and it was into those premises that the Fleischman stock was moved. (Record, p. 31.) Fleischman moved the post office into said premises and was hired by Rahmstorf as clerk, conducting the post office and continuing as such clerk until about February, 1911. (Record pp. 33 and 37.)

2. At the time of the sale, the evidence shows that the wife of Fleischman, who had been Outside for medical treatment, was on her way back to Alaska, or was expected back that summer, and Fleischman intended to take his wife and leave Alaska permanently. (Testimony of Fleischman, Record, p. 48.)

Up until January, 1912 (1911), he lived with his wife in the N. A. T. & T. Company premises where Rahmstorf conducted his store. '(Testimony of Rahmstorf, Record, p. 23.) He then moved his living quarters from Rahmstorf's place on account of the cold, and went with his wife to live in the store building formerly occupied by himself as a store (Record, p. 33), and there his wife died, January 30, 1912 (Record, p. 48), and on that account he remained in Alaska. (Record, p. 45.)

3. As before stated, about February, 1911, the parties had some difference of opinion as to the conduct of Rahmstorf's business and Fleischman discontinued his clerkship for Rahmstorf and moved his post office business to his former store building, still continuing as postmaster at Rampart, and still retaining the agency of the N. A. T. & T. Company at Rampart, and as such collecting rent from Rahmstorf. In the summer of 1911 he took a trip to Iditarod, where he had mining interests, and returned to Rampart and lived with his wife in his own premises nutil her death, January 30, 1912 (Testimony of Fleischman, Record, p. 44), and otherwise, between February, 1911, and June 1, 1912, he was doing nothing except run the post office (Id.). So in the very nature of things, it cannot be true as testified by Rahmstorf (Record, pp. 33-4) that soon after his wife died Fleischman began "fixing up, replacing shelves, counters, etc.," in his own place of business. There is a year intervening for which Rahmstorf, doubtless from lapse of memory, fails to account.

4. Then comes the controversy as to the circumstances and nature of the employment of Fleischman beginning about June 1, 1912, in the Miner's or F. J. Kalning store at Rampart. In this the issue on the facts is substantially as follows:

a. Rahmstorf claims that in the latter part of May, 1912, Fleischman went to Tanana and purchased a small stock of groceries and landed them at the premises occupied by him as a store prior to May 26, 1910, and that he opened up and conducted a business consisting in the main part of groceries only, as the Miner's store. (Record, pp. 34-35). That while Fleischman claims that F. J. Kalning opened up and owned such business, and that Rahmstorf did considerable business with that store and always made out bills against it in the name of F. J. Kalning or the Miner's Store, he Rahmstorf considered that Fleischman owned and conducted the business, but he could not swear that that was true. (Testimony of Rahmstorf, p. 35; Exhibits 1 and 2, Record pp. 22-3-4-5.) To substantiate this theory he produced some expense bills against M. P. Fleischman attached to the record as Exhibit "C," (Record, pp. 17, 18, 19, 20 and 21.)

b. Fleischman, on the contrary states that on and after June 1, 1912, he kept a very accurate system of books and papers for the said F. J. Kalning as his clerk; that he was careful that any little item billed to himself was corrected because he had heard that Rahmstorf had threatened to sue him; that sometimes he ordered goods for the Kalning store and

sometimes Kalning did; that he, Fleischman, did part of the correspondence and signed Kalning's name by himself; that he did not open up any business at Rampart; that he went to Tanana and ordered the goods for Kalning represented by Defendant's Exhibits 1 and 2; and that he had the care, custody and management of the business when Kalning happened to be absent, only as clerk and **"the same as I did when I was clerking for Rahmstorf,"** (Record pp. 49, 50.) and that Rahmstorf never complained to him personally about his (Fleischman's) connection with the Kalning or Miner's Store. (Record p. 51.) Also that he secured corrected expense bills (except as to talking machines) for those made out against him and represented by said Exhibit "C," (Record p. 46), and that he never endeavored to draw off any of the trade or customers of Julius Rahmstorf (Record p. 47), this last statement being corroborated by Rahmstorf (Record, p. 36.) Witness W. B. Ballou testified that F. J. Kalning had been in the mercantile business at Rampart for two years prior to the trial, in the store where Fleischman conducted the postoffice, which is known as the Miner's Store, (Record p. 52,) and to like effect is the testimony of witness John W. Duncan (Record pp. 53, 54.)

This being the state of the evidence as to Fleischman's employment subsequent to the execution of the so-called contract to refrain, and the same having been palpably disregarded by the lower court because of the erroneous theory on which it proceeded to render judgment, what conclusion must this court

adopt upon a consideration of the same? We claim the conclusion is inevitable,

1. That if the co-called contract to refrain (or, as the court below held, for a sale of the good-will of the business) were to be strictly construed according to the theory of the court below, Rahmstorf himself caused the first breach thereof by employing Fleischman as a clerk in his own store; that afterwards, when he and Fleischman disagreed and Fleischman left his employ he arbitrarily denied Fleischman the privilege of accepting employment elsewhere in any capacity for the reason, as he states in his amended reply (Record, p. 13) that Fleischman had agreed to leave Alaska and go outside and stay there.

2. That in truth and in fact Fleischman never did open up or conduct, either as managing clerk or otherwise, the said F. J. Kalning or Miner's Store.

3. That no ulterior interest on the part of Fleischman in the Miner's Store business can be presumed under the pleadings or the facts proved, but that, on the contrary, it being shown that Fleischman avoided even the appearance of evil by withholding his own name or credit from the business, and merely clerking in the store as an incident to his postmastership at Rampart, he must be held to have been within his rights in accepting such employment, even should the contract, Exhibit A, be considered to have passed the good will of the stock of merchandise.

Conceding That the So-Called Contract "Exhibit A" Is Valid, What Damages Were Contemplated By the Parties in Case of a Breach?

The sale was of a stock of merchandise (See Exhibit B, Record p. 33,) not of a business. The stock consisted of a little of everything in the line of general merchandise needed in a mining camp, such as groceries, hardware, drygoods, shoes, and some lumber. (Testimony of Rahmstorf, Record p. 33.) Most of the goods were sold at cost price, and some which were considered dead stock were sold at greatly reduced prices, such as hardware and dry goods, (Id. Record, p. 37,) they were moved from the **situs** and premises where they were theretofore being sold, and installed in the store of Rahmstorf and commingled with goods already there, in premises of which he was the tenant of Fleischman, as heretofore shown.

By the terms of the sale, therefore, Rahmstorf had secured the first and primary benefits inhering in the transaction. In the very nature of things, he could not claim, and he did not claim, the benefit of an established **situs** from Fleischman, nor of an established business or the incidents thereof in the way of books of accounts receivable, the continuance of custom, and the other incidents of good-will defined by the Supreme Court of the United States as follows:

> "Undoubtedly good-will is, in many cases, a valuable thing, although there is difficulty in de-

ciding accurately what is included under the term. It is tangible only as an incident, as connected with, a going concern or business having locality or name, and is not susceptible of being disposed of independently. Mr. Justice Story defined good-will to be: The advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or even from ancient partiality or prejudice."

Metropolitan Bank vs. St. Louis Dispatch, 149 U. S., 446, affirming s. c. 36 Fed. 724.

By a simple process of elimination made inevitable by the facts of this case, therefore, there was, after the sale in question, nothing left as subject of contract between the parties but a doubtful right of Rahmstorf to succeed Fleischman as postmaster at Rampart and as agent of the N. A. T. & T. Company, and a bare agreement "not to engage in any way in the line of general merchandise." (Testimony Rahmstorf, Record p. 30; Exhibit A, p. 32; Testimony Fleischman, pp. 45-6 and 48).

It is doubtless true, as Fleischman states (Record p. 48), that the mere fact of the post-office being situated in a store at Rampart diverted business to it and was a "drawing card" for that purpose—this is

not denied by Rahmstorf; and this fact furnishes the true motive for putting that in the agreement Exhibit A. How much value did the parties attach to this so-called covenant, and what if any part of such value does the so-called forfeit sum of $2000.00 cover? On this the record, other than the bare words of the agreement, is silent.

The terms of the provision as to refraining from business were interpreted by Rahmstorf himself to apply to "opening up and conducting" a merchandise business (Testimony of Rahmstorf, Record, pp. 34, 55), and his theory is adopted by the pleadings and evidence generally. Such is presumed, then, to have been in contemplation of the parties at the time the agreement was signed. We think it amply sustained by the record that Fleischman did not open up or conduct the business of the F. J. Kalning or Miner's Store, but that he was a mere clerk or salesman therein; that his position was identical with that occupied by him in Rahmstorf's store, where he certainly was not manager, because he was discharged upon the first conflict as to management; and that Fleischman was justified, under the strictest interpretation of his agreement, in believing that Rahmstorf could not and would not complain if he, Fleischman, accepted like employment elsewhere.

There is not a scintilla of evidence in the record to disclose what elements of damage entered into the sum agreed to be forfeited as penalty, or that the minds of the parties met upon or measured any sum as the natural or probable consequences of a

breach. All that was agreed upon was, that such an agreement would be executed by Fleischman before he left Alaska, and the sum of $2000 must therefore have been arbitrarily inserted as an indication that Fleischman would pay any sum that Rahmstorf should in future show as damages for a breach. (Testimony of Rahmstorf, Record, pp. 30, 31, 37; Fleischman, pp. 44-48; Assignments of Error IV, VIII, XI, XVI, XVII and XVIII). Such sum could not, either in law or in equity, be considered as commensurate and just upon a sale involving in the first instance only $1791.15!

II.—**Upon the Law:**

1. **As to Assignments of Error I, II and III, and VIII. Ruling on Demurrer and Motion for Judgment on Pleadings and Evidence:**

In his complaint and amended reply the plaintiff below sues upon a cause of action for the recovery of general damages for the breach of contract providing for penalty, and prays for the recovery of liquidated damages. The agreement declared upon '(Amended Reply, pp. 14-15) and the allegations of the complaint (Record, p. 4) show that the sum named was to be forfeited upon certain contingencies, and was therefore but a promise to pay. (See Summons, Record, p. 6.)

The general rule as to liquidated damages is not applicable to contracts for the payment of money alone; in such cases the courts construe the damages as penalty. (13 Cyc., 101.) Of course it is alleged

that the sum stipulated to be paid was incident or ancilliary to a sale; but the terms of the instrument sued on show to the contrary, and such allegation was not established by any competent testimony on the main case of plaintiff below, nor, as we contend, at all.

In fact, all testimony introduced by the plaintiff below, being subjected to our general exception to the taking of testimony at all under the form and allegations of the pleadings (Record, p. 29), was incompetent as far as it sought to establish facts contrary to or to modify or change the terms expressed in said Exhibit A, sued upon. The demurrer admitted only facts well pleaded in the declaration, and only competent testimony on the trial. The only matter in the case admitted by the plaintiff in error sufficient to become evidentiary, is the execution of the agreement to turn over the postoffice at Rampart to the opposite party and refrain from a competing business.

It may be urged that the plaintiff in error lost the benefit of his demurrer by answering; but that cannot be, since the same deformity of the complaint is carried into the reply, and we revived the demurrer before the taking of evidence and at the close of the evidence in chief. If this was not the proper method the defendant in error did not move to have aught done for its correction, and the lower court passed upon the merits. (Record, pp. 27, 29, 40, 56.)

2. **As to Assignments of Error IV, V, VI, VII, X, XI, XII, XIII and XIV. Upon the Admission and Rejection of Evidence:**

A. As to the point raised by Assignment IV, we admit that if plaintiff below had sought recovery under the contract of only such damages as were shown to have been sustained, the objection would not be good; but since the form of the action was for general damages, and the recovery sought for was special, measured and liquidated damages, we were met with that difficulty that, even were the evidence favorable to us under a proper declaration and prayer, it became wholly incompetent and immaterial under the views of the lower court on demurrer.

The same observation will apply to said Exhibit B, referred to in Assignment V. But for the ambiguous nature of the action, that would have been one of our most valuable items of evidence to show the nature and scope of the sale of goods. We are in the position of having waived the benefits of Assignments IV and V, save as to the demurrer and motions hereinbefore referred to.

B. Assignments VI, VII, X, XI, XII and XIII go to the very gist of the whole matter, and for that reason we feel justified in giving to them a more extended analysis. For that purpose, and because they all involve the vital principle for this court's decision, we feel justified in having grouped those six assignments practically as one, incidentally calling attention to the principles or decisions applicable to each.

First: The complaint alleges (Record, p. 5) "That

by reason of the premises plaintiff has suffered damage in the sum of two thousand dollars, no part of which sum has been paid to plaintiff by defendant"; this is denied generally by the answer (Record p. 8), and specially and affirmatively by paragraph V (Record p. 11). The lower court held that under this issue, it was not incumbent upon the plaintiff to offer proof of damage, because of the **implied** terms of the agreement declared upon. (See Record, p. 42; Proposed Findings and Conclusions, pp. 57-61; Conclusion of Law III, p. 68; Opinion of Lower Court, pp. 73-75.) The agreement was not sufficient on its face to sustain the recovery, and required proof extraneous and independent in order to sustain it even as a bond for penalty in case of breach; and this the law does not countenance in an action of this nature, because where the contract sued on is incorporated as a part of the pleading, it is to be treated as a controlling part thereof. (Arnold v. Scharbauer, 116 Fed. at p. 495.) Even if the contract was doubtful in meaning, it was the duty of the court to construe it so as not to give one party an unfair advantage over the other and so to avoid a forfeiture. (9 Cyc., 587.)

Second: We come, then, to a consideration of the underlying error which induced the judgment in this case, viz: that committed by the lower court in holding the agreement Exhibit A (a) to have been a part of some other transaction, and (b) that the terms of the contract or agreement Exhibit A, as to the damages contemplated by the parties were not controlling in the case.

The lower court relies for this result upon the case of Sun Printing Co. vs. Moore, 185 U. S. 642; 46 L. Ed., 366, upon a correct construction of which we feel the judgment should be reversed. That decision does not hold as did the lower court in this case, that

> "It is true, as contended by Fleischman, that the word "forfeit" in the contract would ordinarily indicate penalty rather than liquidated damages; but the courts hold universally at the present time that the language used in such a contract is not controlling; that the court will look at the whole contract and the purposes for which it was entered into for its meaning, rather than to the language used by the parties." (Opinion, Record, p. 73.)

The ruling of the Supreme Court of the United States is diametrically to the contrary, as we will proceed to show. In that case, the charter party defended against specifically liquidated the damages at the sum of $75,000.00 in these words:

> "That for the purpose of this charter, the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars ($75,,-000.00), and the said hirer shall procure surety or guarantee to and for the owner in the sum of seventy-five thousand dollars ($75,000.00), to secure any and all losses and damages which may occur to said boat or its belongings, which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of

> the terms or conditions of this contract. * * * That we expressly waive and dispense with notice of any demand, suit, or action at law against the hirer, and expressly waive any and all notice of nonperformance of the terms of said annexed agreement on the part of the hirer to be kept and performed; * * * that our liability hereunto shall in no case exceed the sum of seventy-five thousands dollars ($75,000.00)."

It thus appears that the damages for non-delivery of the ship were estimated by the parties before signing the contract; they were measured, in fact—liquidated. Supposing in that contract the printing company had merely said: "In consideration of one dollar and of a certain charter party, etc., we agree to return said yacht at a certain time, and should we fail so to do we promise to forfeit the sum of $75,000.00;" there also being independent covenants in the contract covered by such penalty—would the learned Chief Justice have construed the sum to have been measured and liquidated? Clearly not, under the principles enunciated by the Supreme Court of the United States on the subject since very early times, and as digested beginning on page 378 of the Law Edition, where the court lays down the following as a statement of the controlling principle as gathered from the case of Van Buren vs. Digges, 11 How., 461 (13 L. Ed. 771):

> "The clause of the contract providing for the forfeiture of 10 per centum on the amount of the contract price, upon failure to complete the work

by a given day, cannot properly be regarded as an agreement or settlement of liquidated damages. The term 'forfeiture' imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction regardless or the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced where this can be done in its real character, viz: that of a penalty."

See also:

Quinn v. United States, 99 U. S., 30; 25 L. Ed., 269;

Clark v. Barnard, 108 U. S., 436; 27 L. Ed., 780;

Watts v. Camors, 115 U. S., 353; 29 L. Ed., 406;

Bignall v. Gould, 119 U. S., 495; 30 L. Ed., 491;

Tayloe v. Sandiford, 7 Wheat., 13; 5 L. Ed., 384.

And quoting from some well-selected English cases the court says further (46 L. Ed., 379):

There is no doubt that where the doing of any particular act is secured by a penalty, a court of equity is anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid. (Ranger v. Great Western R.

Co.; 5 H. L. Cas. at p. 94). Further: The five thousand pounds is expressly declared by the covenant to be as and by way of liquidated damages, and not as penalty. It is a sum named in respect of the breach of this one covenant only, and the intention of the parties is clear and unequivocal. The courts have indeed held in some cases the words 'liquidated damages' are not to be taken according to their obvious meaning; but these cases are all where the doing or omitting to do several things of various degrees of importance is secured by the sum named, and, notwithstanding the language used, it is plain from the whole instrument the real intention was different. (Price v. Green, 16 Mees. & W., at p. 354). And then, summing up the substance of the leading State decisions, the court proceeds to this conclusion:

> "The law does not limit an owner of property, in his dealings with private individuals respecting such property, from affixing his own estimate of its value upon a sale thereof, or, on being solicited, to place the property at hazard by delivering it into the custody of another for employment in a perilous adventure. If the would-be buyer or lessee is of the opinion that the value affixed to the property is exorbitant he is at liberty to refuse to enter into a contract for its acquisition. But if he does contract, and has induced the owner to part with his property on the faith of stipulations as to value, the purchaser or hirer, in the absence of fraud, should not have the aid of a court of equity or of law to reduce

> the agreed value to a sum which others may deem is the actual value. * * * As the stipulation for value referred to was binding upon the parties, the trial court rightly refused to consider evidence tending to show that the admitted value was excessive." (45 L. Ed., at p. 382).

And it is upon this conclusion that the trial court in the case at bar held that the agreement (Exhibit A), in which the sum named is for penalty or to be forfeited, was not really such, but was for measured and liquidated damages!

C. The plaintiff in the court below must have felt very uncertain as to his position, because in his complaint he even omitted the nominal consideration named in the agreement (Exhibit A), and injected a consideration **aliunde** the terms thereof—a sale which was independent and past. And then it was sought to bolster his position by stating as a mere conclusion that he had suffered actual damage. He states over objection (Record, p. 34): "I have been damaged—the sales decreased quite heavy, at least fifty per cent. I lost a good many customers." Again (Record, p. 36): "I have been damaged to a far greater extent than the sum stipulated in the agreement, through loss of trade. I never knew of Fleischman taking any of my customers in a direct way. My complaint is that that store, to which I rendered bills as the Miner's Store, has entered into competition with me and got a part of the trade in Rampart."

Were, then, the damages of such a nature as to be incapable of estimation or proof? The plaintiff be-

low says not. Then the court should have refused to receive his conclusion and required proof from his books of account or other competent evidence of the loss, and further proof that such loss was due to the acts of Fleischman. This is what is required, and no less is required, by the judgment of the Supreme Court of the United States in the Sun Printing Co. case, and it was incumbent upon the plaintiff below, and not upon his adversary, to put such matters in proof of his main case.

Evans v. Moseley, (Kan.) 114 Pac., 374; 50 L. R. A. (N. S.), 889.

In the case just cited, the decisions are exhaustively collated in the note to the L. R. A., and afford an instructive treatise on the question here in issue; and the court, after a review of the cases of Van Buren v. Digges and Sun Printing Co. v. Moore, **supra,** and many others, announces this doctrine (pp. 897-8, 50 L. R. A.):

> "We think it may fairly be said that, while ordinarily parties are bound by the terms of their contracts, still the courts have an idea that they are constituted to do justice, and unless it appears that the parties bona fide and actually intended to stipulate for liquidated damages, which damages would often be grossly inequitable and unjust, they will be presumed by the courts to have intended that which is just and equitable,— a mere penalty; and especially so where the language used is susceptible of either construction, or where it is plain that actual damages

> might without serious difficulty have been estimated in advance, or where the sum agreed upon would be recoverable alike for a partial or for a total breach."

And while there were other questions in that case, the same was reversed and remanded for a new trial as to the amount of damages only.

D. It then becomes pertinent to inquire if the question was sufficiently raised at or before the trial, or so as to give the lower court opportunity to correct the error. We think a brief reference to the record will serve to answer that question in the affirmative. The exception arose upon our offer to prove the contrary of Rahmstorf's statement of actual damages on Record, pp. 36 and 34, (See Record, p. 42; Assignments vi, viii, x, and xi), and upon our offer to prove in the record, p. 43, and the question and answer (Record p. 51), referred to in Assignment XIII. The question was further reserved on the motion for new trial (Record, pp. 69, 70, 71 and 72), and while perhaps the ruling on the motion for new trial may not constitute reversible error, this Court will look to that ruling and consider the same for the purpose of ascertaining the grounds of other errors assigned which do not appear at large elsewhere in the record. Well might the lower Court observe:

> "Even if this contract should be construed as containing provisions for penalty rather than liquidated damages, the result might not have been different because, as testified by the plain-

tiff, the damages he actually sustained exceeded this amount. Of course the testimony was limited, so **the truth of this statement wasn't admitted, and the cross-examination was restricted on that point. There would have been error, of course, if the contrary rule had prevailed—I mean if it were true the contract was for penalty rather than liquidated damages."** (Opinion, Record, p. 75—black face not in original.)

Might not the result have been different had Rahmstorf produced his books and attempted to show how and how much he had been damaged **by the acts of Fleischman?** Might not the result have been different if we had been permitted to show that Rahmstorf had made returns under oath for the purpose of securing a merchandise license, from which it would appear that his business had not fallen off or decreased since the opening up of the store of Kalning or Miner's Store, and that he paid the same rate under the law subsequently as he did before? The "different result" can best be inferred from the quiescence of counsel for plaintiff below when Rahmstorf was asked what merchandise license he paid for the year 1911 and he answered without objection; but when asked what it was for 1912, objection was promptly made—for that was the year the Miner's Store was opened up. (Record, p. 41). We had not the books or business of the plaintiff in our possession, and were offering matters of record which we contended, and still contend, would have gone far toward establishing the bad faith of Rahmstorf's tes-

timony. (Record, pp. 41, 42, and 43.)

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3. As to Assignment XIV.

The plaintiff below secured permission to amend his declaration by stating the Miner's Store business was opened up and conducted by Fleischman "as managing clerk," under the pretence that such amendment was conforming the pleading to the proofs. What proofs? The statement of Rahmstorf (Record, p. 34) that

> "goods were landed in this house before mentioned and it was opened up for his business, and he conducted and managed his business * * a general store, but in the main part it consisted of groceries only"?

and that "I cannot swear that Fleischman owns that business," (Record, p. 35)? And the statement of Fleischman that he never opened up or conducted any business whatever (Record, p. 49)? And the further fact tendered in proof, that F. J. Kalning had taken out the license for the Miner's Store for 1912 and 1913? And the further statements of Fleischman on cross-examination as to the nature and scope of his employment (Record, pp. 48, 49, 50 and 51)? If the purpose of the contract was to exclude Fleischman from accepting employment as a clerk, why did Rahmstorf employ him?

4—As to Assignments XV, XVI, XVII and XVIII.

The questions raised by these assignments are so interwoven with those already raised, that a separate

discussion of them is not deemed necessary here. We content ourselves with the observation that, where the restraint arising from a covenant to refrain from the pursuance of a lawful business or occupation is the main purpose of the contract, and is not ancilliary to the sale of a business or like purpose, then the courts uniformly hold such agreements to be void.

Richardson v. Buhl (Mich.) 6 L. R. A., 457; 43 N. W., 1102;

Arnot v. Coal Co. (N. Y.), 23 Am. Rep., 190;

People v. Milk Exchange (N. Y.), 27 L. R. A., 437; 39 N. E., 1062;

People v. Refining Co. '(N. Y.), 5 L. R. A., 386; 7. N. Y. Supp., 406;

State v. Distilling Co. (Neb.), 46 N. W., 155;

State Etc. v. Standard Oil Co., 15 L. R. A., 145; 30 N. E., 279;

Am. Biscuit Co. v. Klotz, 44 Fed., 721;

Distilling Co. v. Maloney (Ill.), 41 N. E., 188;

Carbon Co. v. McMillan (N. Y.) 23 N. E., 530;

National Harrow Co. v. Hench, 83 Fed., 36;

Pacific Factor Co. v. Adler (Cal.), 27 Pac., 36;

Santa Clara Etc. Co. v. Hayes (Cal.), 18 Pac., 391.

Upon the whole case, therefore, we contend that the judgment should be reversed with directions that the cause be dismissed; but that, if this Court should be disposed to consider the record as to matters **aliunde** the agreement sued upon and therefrom to conclude the same were a part of the sale mentioned,

then that the cause be remanded for a trial of the issue of damages.

Respectfully submitted,

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Dated Fairbanks, Alaska,

April 3rd, 1915.